

No. 46721-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Cochran,

Appellant.

Lewis County Superior Court Cause No. 13-1-00688-4

The Honorable Judge Richard Brosey

Appellant's Reply Brief

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ARGUMENT

I. THE IMPROPER JUDICIAL COMMENT COMPELS REVERSAL.

- A. The court's nonstandard instruction was a prejudicial judicial comment, requiring reversal.

The court improperly instructed jurors that "[s]exual contact may occur through a person's clothing,"¹ without adding the requirement of "some additional evidence of sexual gratification." *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991). The instruction's half-truth amounted to a comment on the evidence. Wash. Const. art. IV, § 16; *cf* WPIC 45.07; RCW 9A.44.010.

This instruction did not "simply give the jury the legal standard." Brief of Respondent, p. 10. It gave jurors an incorrect and misleading half-truth about the legal standard. Respondent does not directly address this argument. *See* Brief of Respondent, pp. 8-9.

The record does not affirmatively show that no prejudice could have resulted from the court's nonstandard instruction. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). Mr. Cochran denied molesting B.A. RP (7/17/14) 224. The prosecution rested on allegations that he inappropriately touched B.A. through clothing. The court's instruction favored conviction by giving credence to the state's theory without

¹ CP 124.

clarifying the need for “some additional evidence of sexual gratification.”

Powell, 62 Wn. App. at 917.

Respondent does not apply the *Levy* standard, which requires the state to show more than what is required under the ordinary test for constitutional error. *Id.* Instead, Respondent summarizes the evidence in a light most favorable to the state—something that is not allowed even under the ordinary test for constitutional error. *See* Brief of Respondent, p. 10.

The judicial comment infringed Mr. Cochran’s right to a fair trial, free of improper influence, and a decision by an impartial jury. *Id.* His child molestation convictions must be reversed and the charges remanded for a new trial. *Id.*

B. In addition to amounting to an improper judicial comment, the court’s instructions also relieved the state of its burden to prove “sexual contact.”

Jury instructions must be manifestly clear. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). The instructions here were not: they did not make clear the state’s burden of providing “some additional evidence of sexual gratification.” *Powell*, 62 Wn. App. at 917; CP 124. This relieved the state of its burden to prove “sexual contact.”

The error requires reversal because the sexual gratification element was controverted. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889

(2002). Mr. Cochran's convictions must be reversed and the case remanded. *Id.*

II. PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

The prosecutor committed prejudicial misconduct by telling jurors they could convict "if you feel it in your mind, in your gut..." RP (7/18/14) 267; *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). The prosecutor emphasized the juror's feelings rather than "probative evidence and sound reason." *Glasmann*, 175 Wn.2d at 704; RP (7/17/14) 267.

A verdict should be based on evidence and reason. It should not be based on feelings. *Id.* The prosecutor's closing argument and Respondent's argument on appeal improperly suggest otherwise. Brief of Respondent, pp. 17-18.

The misconduct created "great prejudice because it reduce[d] the State's burden and undermine[d] [Mr. Cochran's] due process rights." *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010). It was particularly prejudicial because it occurred during closing argument. *Glasmann*, 175 Wn.2d at 706.

Mr. Cochran's convictions must be reversed for prejudicial misconduct. *Id.*

III. THE COURT’S “REASONABLE DOUBT” INSTRUCTION IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR “THE TRUTH.”

Mr. Cochran rests on the argument set forth in his Opening Brief.

IV. THE PROSECUTOR SHOULD NOT HAVE EXPOSED JURORS TO DETECTIVE HUGHES’ OPINION THAT B.A.’S STATEMENTS WERE ALL CONSISTENT.

B.A. made inconsistent statements regarding the circumstances of the alleged abuse. *See* Appellant’s Opening Brief, p. 18. The state introduced Detective Hughes’s testimony that all of her statements were “consistent.” RP (7/17/14) 185.

This was an “explicit or nearly explicit” opinion on B.A.’s credibility. *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009). As in *King*, the improper opinion testimony created a manifest error affecting Mr. Cochran’s right to a jury trial. *Id.*; RAP 2.5(a)(3).

To raise an issue under RAP 2.5(a)(3), an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). The showing required under RAP 2.5(a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.* An error has practical and identifiable consequences if “given what the trial court knew at that time, the court

could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

In this case, the trial judge knew that Mr. Cochran had pled not guilty, putting at issue every element of the charged crime. The trial judge knew that Detective Hughes’s testimony included a “nearly explicit” opinion on B.A.’s credibility. *King*, 167 Wn.2d at 332. In other words, the record is complete, and the error should be reviewed.

Respondent makes two errors in suggesting that the error is not manifest. Brief of Respondent, pp. 23-28. First, Respondent confuses the merits of the issue with the showing required to obtain review under RAP 2.5(a)(3). The record is complete here, and Respondent concedes that any error is constitutional. Brief of Respondent, p. 26. That is all that is required under established Supreme Court jurisprudence. *Lamar*, 180 Wn.2d at 583.

Second, even Respondent’s argument on the merits—inappropriate to the RAP 2.5(a)(3) issue—does not establish Respondent’s point. Detective Hughes gave his definitive opinion that B.A.’s statements were “consistent.” RP (7/17/14) 185. Jurors likely accepted this authoritative pronouncement at face value. If they even noticed the various inconsistencies in B.A.’s statements, they might well have assumed these

inconsistencies didn't matter—that her accusations were consistent enough, based on Detective Hughes's endorsement.

The improper opinion invaded the province of the jury and deprived Mr. Cochran of his constitutional right to a jury trial. *Id.* Respondent makes no effort to show that the error was harmless beyond a reasonable doubt. In fact, the improper opinion testimony was particularly prejudicial, because it came from law enforcement and thus carried “a special aura of reliability.” *Id.*, at 331.

The improper testimony invaded the province of the jury and infringed Mr. Cochran's constitutional right to a jury trial. *State v. Quaaale*, 182 Wn.2d 191, 200, 340 P.3d 213 (2014). The convictions must be reversed and the case remanded. *Id.*

V. MR. COCHRAN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Cochran rests on the argument set forth in his Opening Brief.

VI. RESPONDENT'S CONCESSION THAT INSTRUCTION 18 WAS AN IMPROPER COMMENT ON THE EVIDENCE REQUIRES REVERSAL.

Respondent concedes error. Brief of Respondent, pp. 33-34 (citing *State v. Brush*, No. 90479-1, 2015 WL 4040831 (Wash. July 2, 2015)).

This concession requires reversal.

First, the state cannot show that the record affirmatively establishes a lack of any prejudice. *Levy*, 156 Wn.2d at 725. Respondent does not address this standard.

Incorrectly believing that *anything* “more than a few weeks” qualifies as a prolonged period of time, the jury had no choice but to return an affirmative verdict. This removed a factual question from the jury’s consideration.

It is irrelevant that the evidence is sufficient: the jury should have been tasked with deciding whether or not the timeframe here qualified as a prolonged period of time under the facts of the case. The court’s instruction removed the issue from them.

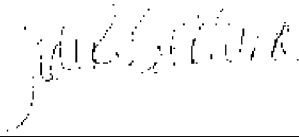
Second, the court’s instruction means there is no jury verdict upon which to base an exceptional sentence. The jury did not decide whether or not the crimes took place over a prolonged period of time; the judge did. Thus, the aggravating factor cannot stand.

CONCLUSION

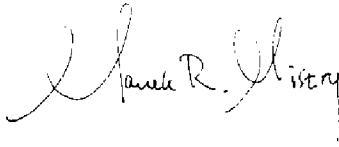
For the foregoing reasons, Mr. Cochran's convictions must be reversed.

Respectfully submitted on July 30, 2015,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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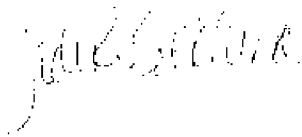
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 30, 2015.



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BACKLUND & MISTRY

July 30, 2015 - 10:27 AM

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